JURAIMI HUSIN

v.

LEMBAGA PENGAMPUNAN, NEGERI PAHANG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R2-24-26-2001]
22 MAY 2001

CIVIL PROCEDURE: *Striking out - Whether summons contained matters that were non-justiciable - Whether outside jurisdiction of court - Whether an abuse of process of the court - Whether unsustainable - Courts of Judicature Act 1964, s. 84(1) - Rules of the High Court 1980, O. 18 r. 19*

CONSTITUTIONAL LAW: *Courts - Judicial power - Clemency by - Sovereign ruler - Whether court has power to interfere with royal prerogative of mercy - Whether susceptible and amendable to judicial review - Whether death sentence could be reversed - Whether non-justiciable and outside jurisdiction of the court - Whether plaintiff's action was frivolous, vexatious and an abuse of the process of the court - Constitution of State of Pahang, art. 15 - Courts of Judicature Act 1964, s. 84(1) - Federal Constitution, arts. 5(1), 42(4)(b), (8), 160, s. 35 of 11th Schedule*

The plaintiff in this case was praying for a declaration that the rejection of his petition for clemency by the Pahang Pardons Board ('first defendant') was unconstitutional, null and void. The plaintiff further sought for a declaration that the dehumanising factor of prolonged delay in the execution of the sentence of death imposed on him had the constitutional implication of depriving him of his life in an unjust, unfair and cruel manner so as to offend the constitutional guarantee that no person shall be deprived of his life or liberty in accordance with law as guaranteed under the provisions of art. 5(1) of the Federal Constitution. The plaintiff further submitted that the first defendant did not explain the delay in the disposal of the plaintiff's clemency petition and that plaintiff had a constitutional right to apply for clemency in regard to art. 15 of the Constitution of the State of Pahang and art. 42 of the Federal Constitution.

The defendants in the instant application prayed for an order that the plaintiff's summons for declarations ought to be struck out under the provisions of O. 18 r. 19 of the Rules of the High Court ('RHC') on the grounds that: (1) the matters raised in the summons are non-justiciable and/or outside the

jurisdiction of the court; (2) that the death sentence imposed on the plaintiff by the High Court and confirmed by the Court of Appeal and Federal Court was final and conclusive and; (3) the plaintiff's summons was an abuse of the process of the court.

Held:

[1] To determine the issue of justiciability, the court had to consider whether the 'law' in art. 5(1) includes procedure. The case of *Re Tan Boon Liat* had authoritatively interpreted 'law' to include procedure.

[2] Article 42(8) of the Federal Constitution does not provide any time when the Pardons Board must meet to consider and dispose of a clemency petition. However by virtue of art. 160 and s. 35 in the 11th Schedule to the Federal Constitution the Pardons Board had to meet with speed. In this case, no explanation had been given in the affidavit in reply by the first defendant as to why the Pardons Board had only met on 4 April 2001 after the plaintiff's clemency petition was received on 17 July 1999. Therefore, the Pardons Board had not acted with convenient speed.

[3] Mercy is not the subject of legal rights. It begins where legal rights end. The death sentence imposed on the plaintiff here is constitutionally valid and permissible by law. The legality of a delayed execution could not be questioned. By its very nature, the prerogative of mercy was not an act susceptible or amendable to judicial review.

[4] A sentence of death imposed by a court of law on a convicted person who had since exhausted his legal remedies will not be carried out only if the Yang Di Pertuan Agong or the Ruler of a State or Yang Di Pertuan Negeri, as the case may be, commutes the death sentence in exercise of the powers under art. 42 of the Federal Constitution. If there is to be a stay of such sentence, the power to stay is only exercisable by the Yang Di Pertuan Agong or the Ruler of a State or the Yang Di Pertuan Negeri, as the case may be.

[5] Proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. The power of mercy is a high prerogative exercisable by the Yang Di Pertuan Agong or the Ruler of a State or the Yang Di Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter.

[6] The death sentence pronounced by the High Court and confirmed by the Court of Appeal and the Federal Court was final and conclusive and could not in any event be reversed. The matter had been fully adjudicated and finally determined. The plaintiff had exhausted all his legal rights and remedies and the sentence could not be allowed to be reopened and relitigated.

[7] The issues raised in the summons were non-justiciable and was outside the jurisdiction of this court and by virtue thereof the action of the plaintiff was frivolous, vexatious and clearly an abuse of the process of the court. The court could not adjudicate on the power of clemency of His Royal Highness the Sultan of Pahang as otherwise it would become an extra-curial trial. Therefore, the plaintiff's summons was obviously unsustainable, unarguable and could not succeed and was struck out under O. 18. r. 19 of the RHC.

[Plaintiff's summons struck out with costs.]

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1996] 1 MLJ 382 ***(refd)***
Che Ani Itam v. PP [1984] 1 CLJ 72 ***(refd)***
Cheah Soon Hoong v. PP [1972] 2 MLJ 170 ***(refd)***
Chiow Thiam Guan v. Superintendent of Pudu Prison & The Government of Malaysia [1983] 1 CLJ 278 ***(refd)***
Collector of Land Revenue South West District Penang v. Kam Gin Paik and Others [1986] 1 WLR 412 ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 ***(refd)***
De Freitas v. Benny [1976] AC 238 ***(refd)***
Haja Moideen v. Government of India [1991] Cr LJ 1325 ***(refd)***
Jabar v. PP [1995] 1 SLR 617 ***(refd)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(refd)***
Karpal Singh v. Sultan of Selangor [1987] 2 CLJ 342 ***(refd)***
Kehar Singh v. Union of India [1989] SC 653 ***(refd)***
Lewis v. Attorney General [2000] 5 LRC 253 ***(refd)***
Lewis, Cohen Aaron Shelton lwn. Jemaah Pengampunan Pulau Pinang & Yang Lain [1991] 3 CLJ 2086 ***(refd)***
Maneka Gandhi v. Union of India AIR [1978] SC ***(refd)***
Minerva Mills Ltd v. Union of India, [1981] 1 SCR 206 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
PP v. Mah Chuen Lim & Ors [1975] 1 MLJ 95 ***(refd)***
Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 2 MLJ ***(refd)***
Re Tan Boon Liat @ Allen & Anor [1977] 2 MLJ 108 ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449 ***(refd)***
State of Rajasthan v. Union of India [1978] 1 SCR 1 ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 ***(refd)***
Superintendent of Pudu Prison & Ors v. Sim Kie Chon [1986] 1 CLJ 548 ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(refd)***
Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Liau Nyun Fui [1991] 1 CLJ 458 ***(refd)***
Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 ***(refd)***

Legislation referred to:
Constitution of the State of Pahang, art. 15
Courts of Judicature Act 1964, s. 84(1)
Federal Constitution, arts. 4(1), 5(1), 42(4)(b), (8), 160, s. 35 of 11th sch
Rules of the High Court 1980, O. 18 r. 19(1)(d)

Constitution of India, arts. 5(1), 21, 72, 161

For the plaintiff - Karpal Singh (Gobind Singh Deo); M/s Karpal Singh & Co
For the defendant - Dato' Abdul Ghani Patail (Dato' Mohd Azahar, Tun Majid Hamzah & Dato' Mary), AG's Chambers

Reported by Suhainah Wahiduddin

JUDGMENT

Faiza Tamby Chik J:

By their application (encl. 7), the defendants pray for an order that the plaintiff's summons for declarations ought be struck out under the provisions of O. 18 r. 19 of the Rules of the High Court 1980 on the grounds:

(1) The matters raised in the summons are non-justiciable and/or outside the jurisdiction of the Honourable Court;

(2) That the death sentence imposed on the plaintiff by the High Court and confirmed by the Court of Appeal and the Federal Court is final and conclusive; and

(3) The plaintiff's summons is an abuse of the process of court.

In his summons, the plaintiff is praying, *inter alia*, for a declaration that the rejection of his petition for clemency dated 30 June 1999 by the first defendant is unconstitutional, null and void and of no effect. He is further seeking a declaration that the dihumanising factor of prolonged delay in the execution of the sentence of death imposed on him has the constitutional implication of

depriving him of his life in an unjust, unfair and cruel manner so as to offend the constitutional guarantee that no person shall be deprived of his life or liberty save in accordance with law as guaranteed under the provisions of art. 5(1) of the Federal Constitution which by the provisions of art. 4(1) is the supreme law of the land. In para. 18 of his affidavit affirmed and filed on 4 May 2001 the plaintiff says his clemency petition dated 30 June 1999 was only heard and rejected by the first defendant, the Pahang Pardons board, on 4 April 2001 and not expeditiously for no apparent nor acceptable reason. In para. 17 of the said affidavit, the plaintiff says he has suffered acute mental torture in confinement. In a nutshell, the plaintiff is saying the long unexplained delay in disposing of his clemency petition is in violation of art. 5(1) which states, 'person shall be deprived of his life or personal liberty save in with law'. He says any procedure which takes away life or personal liberty of a person must in view of the provisions of art. 5(1) be reasonable, just and fair. He argues this procedural requirement must be observed by constitutional dictates at every stage of the trial of a prisoner until the last breath of his life. He says the fundamental right to life is of no less significance than the disposal of a clemency petition expeditiously. It is the submission of the plaintiff that Haron Abdul Kader, the secretary of the Pahang Pardons Board does not explain the delay in the disposal of the plaintiff's clemency petition in his affidavit in reply affirmed on 17 May 2001. The plaintiff further submitted that as the delay is inordinate and is not denied or explained, the plaintiff's assertion on this score should stand (see *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 MLJ 281 and *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1996] 1 MLJ 382). The plaintiff also submitted that he has a constitutional right to apply for clemency having regard to art. 15 of the Constitution of the State of Pahang and the art. 42 of the Federal Constitution. Article 42(8) states, 'The Pardons Board shall meet in the presence of the Ruler ... and he shall preside over it.' And by the provisions of art. 42(4)(b) the powers of clemency are by the Ruler on the advice of the Pardons Board.

It is the submission of the plaintiff that the first issue which requires to be acutely addressed is: Is what the plaintiff is contending justiciable? The plaintiff submitted it is for the following reasons:

(i) Article 5(1) of the Federal Constitution categorically guarantees that a person shall not be deprived of his life or personal liberty save in accordance with law. The question which arises is - Does the word 'law' in this Article include procedure? This issue arose in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108, p. 111 of the report the following passage appears:

> Article 21 of the Indian Constitution provides that no person shall be deprived of his personal liberty except according to procedure established by law. Our Article 5(1) is word for word the same but for the words underline it says "save in accordance with law." One thing common to both countries is that this constitutional right is not absolute. The expression "save in accordance with law" does not necessarily mean "without due process of law" as is understood in India by virtue of the words used in its Constitution. Encik Karpal Singh submits that our expression is wider and that "law" includes procedure.

At p. 114 Lee Hun Hoe CJ (Borneo) concluded:

> The word "procedure" in Article 21 of the Indian Constitution has been interpreted to require strict compliance with procedural requirements which is not required by our Article 5. The Indian Courts have indeed relied on Article 21 to see that the executive states clearly which of the grounds for detention specified in the statute are in fact applicable to a particular detenu. The requirement to provide sufficient particulars is to enable a detenu to properly present his case. The requirement is derived from the statute and is not a procedure laid down by Article 21. Our Article 151 and various sections of the Ordinance prescribe limitations on the right given by Article 5. If the provisions of Article 151 and the various sections of the Ordinance are complied with then the arrest and detention will be lawful even though they infringe personal liberty because the arrest and detention will be in accordance with law. For myself I find it difficult to see how our Article 5 could be interpreted to exclude the question of procedure even though there is no mention of procedure. The exclusion of procedure is merely an inference drawn from the remarks of Suffian FJ in *Karam Singh*'s case. He was merely pointing out the difference in the wordings of the Indian Constitution and our Constitution. He did not say that procedure was not part of the law. I am inclined to agree with Encik Karpal Singh's contention that the expression "in accordance with law" in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression "in accordance with law" were to be construed as to exclude procedure then it would make nonsense of Article 5.

Karpal Singh, counsel for the plaintiff submitted that clearly, the exclusion of procedure was merely an inference drawn from the remarks of Suffian FJ in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129. Unfortunately, in *Che Ani Itam v. PP* [1984] 1 CLJ 72, a three-man bench of the Federal Court did not advert to *Re Tan Boon Liat* (a decision of a five-man bench of the Federal Court) although the same was relied on by him and concluded:

> We do not think the argument advanced by Mr. Karpal Singh can be sustained. We would at the outset observe that a distinction was drawn in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* (at page 1438) between Article 21 of the Indian Constitution and Article 5(1) of our Constitution in that the former provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by 'law' in contrast to the latter which makes no mention of the word 'procedure''.

Karpal Singh further submitted that the three-man bench in *Che Ani* should have followed the decision in *Re Tan Boon Liat.* In any event, *Maneka Gandhi v. Union of India* AIR [1978] SC (a seven-man bench of the Indian Supreme Court was referred to the Federal Court). *Che Ani* which held that a statute which merely prescribes some form of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of art. 21 of the Indian Constitution and that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. In *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal had occasion to refer to the difference in the language in art. 5(1) and art. 21 of the Indian Constitution and come to the conclusion that there was none. The learned judge concluded 'law' included procedural law. Karpal Singh urged me to follow *Re Tan Boon Liat* and *Tan Tek Seng*. There is actually no conflict between *Karam Singh* and *Re Tan Boon Liat*. In *Karam Singh*, the difference in the phrases 'law' in art. 5(1) and 'procedure' established by 'law' in art. 21 had been considered only in passing by Suffian FJ unlike the exhaustive exposition of the position in *Re Tan Boon Liat* and *Tan Tek Seng* (see *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645). In *Jabar v. PP* [1995] 1 SLR 617, the Singapore Court of Appeal relied on *Karam Singh* and *Che Ani* completely ignoring *Re Tan Boon Liat* with Yong Pung How CJ being content in saying at p. 631:

> We respectfully agree that art 9(1) is different from art 21 in India. Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well. However, we do not see how this distinction gives rise to the contentions as submitted by the learned DPP above.

(ii) To determine the issue of justiciability, it is essential for the court to consider whether the 'law' in art. 5(1) includes procedure. Having regard to the authorities in particular, *Re Tan Boon Liat* 'law' has been authoritatively interpreted to include procedure. In *Chiow Thiam Guan v. Superintendent of Pudu Prison & The Government of Malaysia* [1983] 1 CLJ 278 it has been held by the Federal Court on the authority of

De Freitas v. Benny [1976] AC 238 @ 247, that the courts were without jurisdiction to deal with the position there obtaining as mercy is not the subject of legal rights; see also *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 268 and *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; and *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342. Karpal Singh further submitted that however, it is interesting to note the dicta of Lord Diplock in *De Freitas v. Benny* has been doubted in *Lewis v. Attorney General* [2000] 5 LRC 253 where it was held:

> Under s. 90 of the Constitution, the ultimate decision as to whether there should be commutation of a death sentence or pardon, the exercise of the prerogative of mercy, was for the Government-General acting on the recommendations of the Jamaican Privacy Council. The merits were not for the courts to review. However, it did not follow that the whole process was beyond review by the courts. The experience, status and independence of the members of the Jamaican Privy Council were important features of the process but were not conclusive reasons why judicial review should be excluded. Neither was the fact that an exercise of the prerogative was involved. The act of clemency was to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence.

Therefore Karpal Singh was of the view that in view of *Lewis, Cohen Aaron Shelton lwn. Jemaah Pengampunan Pulau Pinang & Yang Lain* [1991] 3 CLJ ought to be doubted too. And so too *Sim Kie Chon* and *Chiow Thiam Guan*. And Karpal Singh urged the court to be guided by the Indian position. In India, art. 72 and 161 are somewhat equivalent to our art. 42 of the Federal Constitution and art. 15 of the Constitution of the State of Pahang.

Article 72 states:

> (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.
>
> (a) in all cases where the punishment or sentence is by a Court Martial;
>
> (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
>
> (c) in all cases where the sentence is a sentence of death.
>
> (2) Nothing in sub-cl. (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Force of the Union to suspend, remit or commute a sentence passed by a Court of Martial;

(3) Nothing in sub-cl. (c) of cl. (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor ... of a State under any law for the time being in force.

Article 161 states:

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

Karpal Singh further submitted that the position has been aptly reviewed in *Haja Moideen v. Government of India* [1991] Cr LJ 1325 which reviews including those in the Supreme Court. At p. 1334 the principles are distilled as follows:

We will be left with the only consideration of the delay on the part of the executive after the finality of the judicial process. The last of the cases in which the Supreme Court had to consider this important question of a speedy trial as a part of one's fundamental right under Article 21 of the Constitution to life and liberty which liberty was no less important for disposal of the mercy petition in execution of the sentence of death is enunciated in *Madhu Mehta v. Union of India* [1989] 3 Crimes 104: (1989 Cri LJ 2321).

23. In the aforestated case, the Supreme Court held, that it was well-settled that undue long delay in execution of the sentence of death would entitle, the condemned person to approach the Supreme Court under Article 32 of the Constitution, but that Court would only examine the nature of delay caused and circumstances that ensured after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. But the Court was entitled and indeed obliged to consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay can be considered to be decisive. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. Endorsing the views of Jagannatha Shetty J, in *Triveniben* case (1990 Cri LJ 1810) that as between funeral fire and mental worry, it is the latter which was more devastating, for funeral fire burns only the dead body while the mental worry burns the living one, held on the facts of that case that the mental agony suffered by the convict, living under the shadow of death for long, far too long should be put an end to by altering the sentence into one of imprisonment for life.

It is accepted in India, that there can be no judicial review or justiciability of the decision of the Pardons Board on the merits. However the decision-making process resorted to by the Pardons Board can be examined to consider whether it is in line with the spirit of constitutional provisions. This is brilliantly set out by the India Supreme Court in *Kehar Singh v. Union of India* [1989] SC 653 @ 659 - 660 as follows:

> In the course of argument, the further question raised was whether judicial review extends to an examination of the order passed by the President under Art 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram v. Union of India* [1981] 1 SCR 1196 at p. 1249: (AIR 1980 SC 2137 at pp. 2174-2175). The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court. In Special Reference No. 1 of 1964: [1965] 1 SCR 413 at p. 446; (AIR 1965 SC 745 at p. 763) Gajendragadkar, CJ, speaking for the majority of this Court, observed:
>
> > ... Whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution ... .

This court in fact proceeded in *State of Rajasthan v. Union of India* [1978] 1 SCR 1 at pp. 80-81: (AIR 1977 SC 1361 at pp. 1413-1414) to hold:

> ... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so ... this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law ... .

and in *Minerva Mills Ltd v. Union of India*, [1981] 1 SCR 206 at pp. 286-287: (AIR 1980 SC 1789 at pp. 1825-1826), Bhagwati J said:

> ... the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded ... . The Constitution has,

> therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review ...

Karpal Singh urged me to consider whether the provisions of art. 42(4)(b) and (8) of the Federal Constitution have been complied with. It is his submission that it is my bounden duty to do so. He further submitted that art. 42(8) does not provide any time when the Pardons Board must meet to consider and dispose of a clemency petition. However by virtue of art. 160 and s. 35 in the 11th Schedule to the Federal Constitution the Pardons Board had to meet with speed (see *Collector of Land Revenue South West District Penang v. Kam Gin Paik and Others* [1986] 1 WLR 412; *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 2 MLJ; and *PP v. Mah Chuen Lim & Ors* [1975] 1 MLJ 95. In the instant case, no explanation whatsoever has been given in the affidavit in reply by Haron Abdul Kader as to why the Pardons Board only met on 4 April 2001 after the plaintiff's clemency petition was received on 17 July 1999. Therefore, it cannot be said the Pardons Board had acted with all convenient speed (see *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Liau Nyun Fui* [1991] 1 MLJ 350). In *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481 at pp. 486-487, in delivering the judgment of the Court of Appeal, Gopal Sri Ram JCA had occasion to say:

> Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law-making power of the federation. It also creates and defines the various branches of government. In confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Or as Lord Diplock put it in *Attorney-General of The Gambia v. Momodau Jobe* [1984] AC 689 at p 700:
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> > A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

Therefore in the instant case it is the submission of the plaintiff that the issue raised is justiciable and within the jurisdiction of the court. The decision of the High Court as confirmed by the Court of Appeal and the Federal Court is final. No attempt is being made to re-open the judicial proceedings. It is

the decision making process during the executive clemency stage relating to its compliance with constitutional provisions which is being assailed on the basis of the authorities referred to hereinbefore. It is submitted that there is no question of abuse of process of court. In *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors (supra)* the term 'abuse of process of the court' in O. 18 r. 19(1)(d) had been given a wide interpretation by the courts. It included considerations of public policy and interests of justice. This term signified that the process of the court had to be used *bona fide* and properly and was not to be abused. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process were not closed and could depend on the relevant circumstance of the case. What is involved in the proceedings before the court was a human life, or rather, its elimination or perpetuation depending on the decision of the court. It is also submitted that even the Pahang Pardons Board has allowed a stay of execution pending the outcome of the proceedings before this court. Surely therefore, the plaintiff's application cannot be termed an abuse of process of the court. It is curiously submitted by Karpal Singh that in *Jabar*, no attempt was made to strike out the application. Karpal Singh submitted that he is somewhat surprised in the instant case, the plaintiff's application is being sought to be struck out in limine. The position he submitted warrants hearing of the plaintiff's summons on the merits. The defendants' application he further submitted to strike out the summons, ought under the circumstances, to be dismissed with costs or in the alternative the matter should be referred to the Federal Court pursuant to the provisions of s. 84(1) of the Courts of Judicature Act 1964. It is submitted that the constitutional provisions adverted hereinbefore are being canvassed for the first time in Malaysia. And consequently Karpal Singh submitted that an authoritative interpretation of these constitutional provisions will certainly be to public advantage as there are numerous other clemency petitions which may be affected by the outcome of the plaintiff's summons (see *Wee Choo Keong v. Lee Chong Meng & Anor* [1996] 3 MLJ 41). That is the substantive submission on behalf of the plaintiff by Karpal Singh. In gist what Karpal Singh submitted in the instant application by the defendants is that the act of clemency by the Sultan of Pahang was to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence.

I have considered the submission by Karpal Singh. I prefer to consider the issue from the perspective of whether the court has the power to interfere with the royal prerogative of mercy by the Sultan of Pahang. Mercy is not the subject of legal rights. It begins where legal rights end. The death sentence imposed on the plaintiff here is constitutionally valid and permissible by law. I am of the view that the legality of a delayed execution cannot be questioned.

By its very nature, the prerogative of mercy is not an act susceptible or amendable to judicial review. In *Cheah Soon Hoong v. PP* [1972] 2 MLJ 170 at p. 171 Suffian LP said:

> We made no order as regards whatever decisions had been made by His Majesty on these sentences. When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of part IV of the Constitution, is an executive power - as in *Jamaica, Hinds v. The Queen*.

In *Sim Kie Chon v. Superintendant of Pudu Prison & Ors* [1985] 2 CLJ 449 at pp. 452-453 C to F, Abdul Hamid CJ (Malaya) (as he was then) said:

> In the present case though the Pardons Board tendered advice to the Yang Di Pertuan Agong but clearly Yang Di Pertuan Agong himself exercised the power in accordance with Art. 42(1) above read together with regulation 29 of the Essential (Security Cases) (Amendment) Regulations, 1975. In our view such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amendable to judicial review. (See *Council of Civil Service Unions and Others v. Minister for the Civil Service).* Basically it is an executive power of the nature described by Suffian, LP delivering the Judgment of the Court in *Public Prosecutor v. Lim Hiang Seoh*. Sitting with four other judges, his Lordship said:
>
> > When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account, and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power as in *Jamaica, Hinds v. The Queen*.
>
> (See also *G. Kista Gowd and Another v. State of Andhra Pradesh).*
>
> We hasten to add that we subscribe to what had been in *Michael De Freitas v. George Famoutgar Benny and Others (de Freitas* case) to the effect that "Mercy is not the subject of legal rights. It begins where legal rights end."
>
> In our judgment, a sentence of death imposed by a court of law on a convicted person who has since exhausted his legal remedies will not be carried out only if the Yang Di Pertuan Agong or the Ruler of a State or the Yang Di Pertuan Negeri, as the case may be, commutes the death sentence in exercise of the

powers under Article 42 of the Federal Constitution. If there is to be a stay of such sentence, the power to stay is only exercisable by the Yang Di Pertuan Agong or the Ruler of a State or the Yang Di pertuan Negeri, as the case may be.

In *Chiow Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia* it was held, with reference to an application for stay of execution pending appeal, that:

> Courts are indeed without jurisdiction to deal with this sort of application for the reason so neatly set out in the *De Freitas* case - 'Mercy is not the subject of legal rights. It begins where legal rights end.' Any stay of execution would be only an extension of the prerogative of mercy, exercisable only an extension of the prerogative, exercisable only by his Majesty The Yang Di Pertuan Agong in accordance with Article 42 of the Constitution.

In the present case the appellant's right ends after his appeal was dismissed by the Supreme Court and the death sentence confirmed. Mercy begins but mercy is not a legal right. In the case of *Chiow Thiam Guan v. Superintendent of Pudu Prison and the Government of Malaysia (supra),* it was held that a decision made pursuant to an exercise of a royal prerogative of mercy cannot be varied or confirmed there being no jurisdiction to do so. In our judgment proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable. By the same token a contention of any violation of the fundamental right which rests wholly on or dependent upon such an allegation is also not justiciable. It is our considered view that the power of mercy is a high prerogative exercisable by the Yang Di Pertuan Agong or the Ruler of a State or the Yang Di Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter. (See *Hanratty and Another v. Lord Butler of Saffron Walden.*)

In *Superintendent of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548 at pp. 552-553, Abdoolcader SCJ said:

> The respondent by these proceedings is in our view in effect attempting to circuitously challenge the exercise by His Majesty of his powers of clemency in this case under article 42 of the Constitution which he is expressly precluded from doing by virtue of the provisions of article 32(1) of the Constitution which stipulate that His Majesty shall not be liable to any proceedings whatsoever in any court. The High Court of Australia in *Horwitz v. Connor* held (at p. 40) that no court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy, and a similar attitude toward the royal prerogative of mercy was adopted by the English Court of Appeal in *Hanratty v. Lord Butler of Saffron Walden*. In relation to the question

> of the amenability of a prerogative power to judicial review we think that the enlightened approach is that this would be dependant on its nature or subject matter, and we find support for this view in the decision of the House of Lords in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* where Lord Scarman in his speech (at page 407) says that it can be said with confidence the exercise of a prerogative power is subject to review if the subject matter in respect of which it is exercised is justiciable, that is to say, if it is a matter upon which the court can adjudicate, and again in the speech of Lord Roskill (at page 418) where he refers to examples of prerogative powers which he did not think could properly be made the subject of judicial review, such as *inter alia* that relating to the prerogative of mercy, because their nature and subject matter as such as not to be amendable to the judicial process.

I think the question raised by the plaintiff in the Originating Summons is not justiciable as had been conclusively decided by our then Supreme Court. It is clearly important to bear in mind that the plaintiff has exhausted all his legal rights and remedies. The death sentence pronounced by the High Court and confirmed by the Court of Appeal and the Federal Court is final and conclusive and cannot in any event be reversed. The matter had been fully adjudicated and finally determined. The plaintiff has exhausted all his legal rights and remedies and the sentence cannot be allowed to be re-opened and relitigated.

In *Superintendant of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548 at pp. 554-555, Abdoolcader SCJ said:

> If any court were to accede to the contention advanced on behalf of the respondent on the lines indicated then it would be in effect be countenancing the respondent's participation in the exercise of an executive and prerogative power and virtually reactivating a concluded trial. It follows sequentially that if it is open to a court to examine the advice of the Pardons Board there would then in effect be an extra-curial retrial and endless reventilation of every convict's case.

In *Jabar v. PP* [1995] 1 SLR 617 at p. 631-632 Yong Pung How CJ said:

> We are, however, of the view that once sentence is passed and the judicial process is concluded, the jurisdiction of the court ends. Once the Court of Appeal has disposed of the appeal against conviction and has confirmed the sentence of death, it is *functus officio* as far as the execution of the sentence is concerned. It is not possessed of power to order that the sentence of death be stayed or commuted to a sentence of life imprisonment, especially when the appellant was convicted of an offence which carried a mandatory sentence of death. The power of commutation or remittance of sentence lies only with the President, under s. 8 of the Republic of Singapore Independence Act:

(1) The President, as occasion shall arise, may, on the advice of the Cabinet:

(a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;

(b) grant to the offender convicted or any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or

(c) remit the whole or any part of such sentence or of any penalty or forfeiture.

Likewise, the power to order a stay of execution or respite of the sentence lies exclusively with the President. It is solely the prerogative of the President, to decide whether the delay in execution amounts to sufficient ground to justify a commutation of sentence. It is clearly not part of the court's functions. It was on this ground alone that we dismissed the appeal.

Issues raised in the Originating Summons are non-justiciable and are outside the jurisdiction of this court and by virtue thereof the action of the plaintiff is frivolous, vexatious and clearly an abuse of the process of the court.

In *Karpal Singh v. Sultan of Selangor* [1987] 2 CLJ 342, p. 345 right column, Abdul Hamid CJ (Malaya) (as he then was) said:

Principles governing an application made under Order 18 Rule 19 of the Rules of the High Court, 1980.

The principle is well-established. The court has stated in *Sim Kie Chon v. Superintendent of Pudu Prison & Others* that the principle is clear in that:

It is only in plain and obvious cases that recourse should be had to the summary process under Order 18 Rule 19 of the Rules of High Court, 1980: 'The summary procedure under this Rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.' (*Attorney-General of Duchy of Lancaster v. L & NW Railway Co* [1892] 3 Ch 274 (*Supreme Court Practice 1985*)).

To my mind a sentence of death imposed by a court of law on the convicted plaintiff who has since exhausted his legal remedies will not be carried out only if His Royal Highness the Sultan of Pahang in accordance with art. 15 Chapter II of the Constitution of the State of Pahang commutes the death sentence in exercise of the powers under art. 42 of the Federal Constitution. That power is only exercisable by His Royal Highness the Sultan of Pahang.

In my judgment the exercise of a royal prerogative of mercy by His Royal Highness the Sultan of Pahang cannot be varied or confirmed because there being no jurisdiction to do so. Therefore proceedings in court such as by the plaintiff in the Saman Pemula No. R2-24-26 Tahun 2001 dated 4 May 2001 aimed at questioning the propriety or otherwise of such a decision by His Royal Highness the Sultan of Pahang is therefore not justiciable. By the same token a contention of any violations of fundamental rights which rests wholly on or dependent upon such an allegation is also not justiciable. In my judgment the power of mercy is a high prerogative exercisable by His Royal Highness the Sultan of Pahang who acts with the greatest conscience and care and without fear of influence from any quarter (see *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449). In my judgment the court cannot adjudicate on the power of clemency of His Royal Highness the Sultan of Pahang otherwise it becomes an extra-curial retrial.

Therefore in my judgment the plaintiff's Saman Pemula No. R2-24-26 Tahun 2001 dated 4 May 2001 on the face of it is obviously unsustainable and cannot succeed and unarguable. Accordingly I make an order in terms of the application. In Saman Dalam Kamar dated 17 May 2001 by the defendants in lampiran (7) and the plaintiff's Saman Pemula No. R2-24-26 Tahun 2001 dated 4 May 2001 in lampiran (1) is struck out under O. 18 r. 19 of the Rules of the High Court 1980 with costs.